Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

NICHOLAS STORTI AND MICHAEL PEREZ ,
A MINOR, BY AND THROUGH HIS FATHER AND
NATURAL GUARDIAN, GEORGE PEREZ,
Petitioners,

versus

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION
AUTHORITY AND JOHN K. LEARY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does it violates the First Amendment for a transit authority to close paid areas and platforms at train, bus and trolley stations, open by court decree for 24 years to leafleting and solicitation by Hare Krishnas only, to retaliate for a pending court challenge to a policy permitting that group but no other to leaflet there, where there were no accidents or changed conditions to justify the closing?

2. Does it violate the 1st Amendment to permit by decree and custom Hare Krishnas but no other group to leaflet on platforms and in paid areas in transit stations from 1975-1999?

3. May a transit authority without any evidence of risk to safety, accidents or injuries, close paid areas and station platforms, public forum areas open for 24 years to leafletting and solicitation, where the alternative (focusing on safety concerns) of allowing these activities only a certain number of feet from the edge of the platforms was never considered, no other comparable major urban transit system has a total platform and paid area ban, and a substantial amount of speech which does not cause the alleged but unproven safety concerns is silenced, proving there is no narrow tailoring?

4. Are issues stated in the complaint, motion for preliminary injunction, motion for summary judgment and response to Defendant's motion, issues presented for review, Appellant's Brief of Appellant and in discovery waived?

CORPORATE DISCLOSURE STATEMENT

No publicly-owned corporation not a party to this appeal has a financial interest in the outcome of this litigation.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit in , is set forth in the Appendix attached hereto (App. 1a).

The Opinion of the United States District Court for the Eastern District of Pennsylvania in is set forth in the Appendix attached hereto (App. 5a).

The Order of the United States Court of Appeals for the Third Circuit denying rehearing, is set forth in the Appendix attached hereto (App. 27a).

BASIS FOR JURISDICTION

The final judgment of the United States Court of Appeals for the Third Circuit affirming the decision of the District Court for the Eastern District of Pennsylvania was entered on September 10, 2001. This petition for writ of certiorari is filed within ninety (90) days from that date. 28 U.S.C. Section 2101(c).

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. Section 1254(1).

RELEVANT PROVISIONS INVOLVED

United Stated Constitution:

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

42 U.S.C. § 1983:

Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Direct and Concise Argument Amplifying the Reasons Relied on For Allowance of the Writ

STATEMENT OF THE CASE

1) Facts

While a challenge to the content-based discrimination was pending, SEPTA closed what had been an open forum for 24 years. By consent decree, Hare Krishnas but no others could leaflet in the paid areas and platform areas of train stations in Southeastern PA from April 1975-June 1999. While the same challenge was pending in this case, SEPTA convinced the Hare Krishnas to consent to a modification of the consent decree so that group could no longer leaflet, etc. in those areas. It is clear the closing of the open-for-24-years designated public forum was caused and brought about by these challenges.

On April 25, 1975, SEPTA entered into a Consent Judgment permitting the Krishna Consciousness Movement ("ISKCON") to dance, beat drums, preach, distribute religious literature and flowers and solicit contributions in paid areas and platforms of its train stations, ISCKON v. O'Neill, No. 75-242, (E.D. Pa.). Until June 22, 1999, ISCKON regularly conducted such activities in such areas.

On January 27, 1999, in response to a challenge in Frantz v. SEPTA, No. 97-6631 (E.D. Pa.) of a ban on leafleting in paid areas and on platforms **by groups other than ISKCON**, SEPTA enacted rules banning leafletting on platforms and in paid areas.

On September 10, 1998, Officer Irving Smith told Raymond Frantz that he may not leaflet on a Market Street East Station (MSES) platform in Philadelphia. On April 29, 1999, Smith stopped Michael Perez and told him he could not to leaflet on the MSES platform.

On June 4, 1999, Hare Krishnas sold flowers on a platform below 15th and Market. On June 22, 1999, while this case was pending and after SEPTA convinced ISCKON to sign a modification, the court entered an order modifying the April 25, 1975 Judgment to end ISCKON's right to leaflet in paid areas and platforms.

SEPTA's records reveal no accidents were related to any activity of leafleting. In its discovery responses in Frantz v. SEPTA, ("Frantz"), SEPTA stated one accident was related to leafletting, but could not provide the date, location, name of individuals involved or any details whatsoever, or produce one document showing that leafleting caused accidents or safety problems.

Widths of platforms at Philadelphia stations at 30th Street, Suburban, 69th St. and Bridge Pratt were 12', 20', 25', 26', 28', 30' and 37, and at the 15th and 30th Street Subways, 21',

30' and 70'. SEPTA has permitted vending of newspapers within paid areas and on platforms at its stations. Paid areas are included.

Salvation Army & Girl Scouts solicit funds at stations.

Captain Harold, who coordinates SEPTA public safety issues, stated daily leafleting on station platforms at 15th Street, Market/Frankfort El, or 69th Street never caused any risk to public safety. He obtains statements and makes accurate reports but knows of no leafletting-related accidents or injuries. He saw Raymond Frantz leafletting 12 times at Suburban Station (SS), MSES, 69th Street Station (69th), the Market Street Elevated Station (MSEL), and on the Broad Street Line but never saw him violate any law, blockade or hinder passage. The alleged injury as a result of leafleting was never reported to him. Frantz has never been arrested for, nor created a safety risk by, leafleting though he did so in paid areas frequently. SEPTA G. M. Leary sets policies regarding leafleting. Harold never spoke of safety issues regarding leafleting with him. Harold saw Frantz leafleting every month for 17 years.

SEPTA Officer Werner on June 8, 1996 told Frantz he needed written permission to leaflet at SS. Frantz did not blockade or disobey an order. Werner ordered him to leave and he did so.

SEPTA Officer Heppard saw Frantz on December 11, 1998 leafleting at MSES. He did not touch anyone (but came within 1' of them) or force people to stop. No one complained. He did not impede passage. People walked around him without stopping. **She understood that one may not go up to people and give them literature!**. She received no training on the right to leaflet and has wide discretion to order people to leave the station.

SEPTA Claims Dept. admits there have been no leafletting-related injuries.

The Director of Engineering, SEPTA Buildings Dept., said that in design of structures whether there would be injuries if leafletting was permitted has not been considered. ISCKON's leafletting caused no problems to SEPTA.

SEPTA's Director of Media Relations stated SEPTA never researched whether other major transportation centers have a ban on leafleting on platforms or in paid areas. The only exemption from the January 27, 1999 Rules is for ISCKON.

SEPTA's engineer is unaware of standards as to safe distances from a platform edge one should stand while leafleting, but said people should be 2 -3' away except while boarding. He admits leafleting from platforms at train stations in other major cities--Boston, New York & Washington, D.C-is permitted. No literature recommends a ban on platform leafleting. No other city bans leafleting in paid areas or platforms.

Frantz has leafleted on platforms and in paid areas thousands of times from 1991 – 1999, never impeding any entrance or exit, at a 3/4 angle, careful not to bump into people or be in front of them. He stays arms' length distance away, making sure they have enough room. He never touched anyone's body with his literature, or put it in their face or chest.

The court stated the case mentioned a "single ultimate issue:" whether SEPTA may ban leaftletting on its platforms and paid areas, and stated "Plaintiffs have voluntarily conceded a second claim that the restriction was a violation of their rights to equal protection of the laws." **This refers to Plaintiff's Motion for Summary Judgment, filed July 14, 1999. The motion states that the equal protection claim—which is under the 14th Amendment—is hereby dismissed. It does not state the 1st Amendment claim for viewpoint discrimination is dismissed or waived.** The amended complaint said permitting leafletting by Hare Krishnas but no other group "is a

content-based ban and a violation of Equal Protection under law as guaranteed by the First and Fourteenth Amendments." The content-based ban arises under the 1st Amendment; the Equal Protection Claim, under the 14th Amendment. Only the 14th Amendment claim was waived. The amended complaint at paragraph 22 states:

> 22. The ban on Plaintiffs' distribution of any religious literature on platforms or within paid areas of SEPTA's train, bus and trolley stations within S. E. Pennsylvania while at the same time permitting distribution of religious literature, sale of religious items, and solicitation of donations there by the Hare Krishnas, as well as the deliberate effort to close the paid areas and platforms to all leafleting activity by a January 27, 1999 new policy (put into effect as a direct result of and while a challenge to the constitutionality of the ban on platform and paid area leafleting was pending by Plaintiff in Civil Action No. 97-CV-6631) is a content-based ban and a violation of Equal Protection under law as guaranteed by the First and Fourteenth Amendments.

The content-based discrimination, closing of a open forum and retaliation issues were all preserved. The Brief of Appellants states:

Statement of Basis for Subject Matter Jurisdiction

This is a challenge...to SEPTA's a) total ban on religious leafleting in paid areas and platforms...where for 27 years precisely such activities by another religious group were permitted...b) ban on non-commercial, but not commercial, leafletters ...and d) permitting Hare Krisnas, but no other

religious groups, from leafleting in such paid areas and on platforms [from] period 1975 - June 22, 1999.

Petitioners filed a Motion for T.R.O. & P.I. raising the issues of the viewpoint discrimination and unconstitutional closing of a forum .The motion for Summary Judgment mentions the time period of April 25, 1975—June 22, 1999. The Statement of Issues Presented for Review State:

> May SEPTA permit the Hare Krishnas but not other religious groups from leafleting on platforms and in paid areas of its transportation centers from April 25, 1975 to June 22, 1999?

2) Basis of Federal Jurisdiction

Federal Jurisdiction arises out of 28 U.S.C. §1331.

1. RETAILIATORY CLOSING OF A PUBLIC FORUM

A. Law

Adverse government action taken in retaliation for the exercise of protected speech or a protected right violates the First Amendment. Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 97 S.Ct. 568 (1977); Sulkowska v. City of New York, 129 F. Supp. 2d 274 (S.D.N.Y. 2001). Banning of an activist from an area in retaliation for exercise of free speech rights states a § 1983 claim. McAfee v. Deale, 20 F. Supp. 2d 943 (E.D. Va. 1998). There an animal-rights activist complained about conditions at a shelter to state officials and was accused by shelter officials if fraud, dishonesty and racism. As a result she filed a libel suit. Thereafter, she was denied entry and another time was forced to leave the premises by officials. She sought permission to return. It was never granted. The stated reason for the expulsion was "interference with city business," but there was no evidence

of misconduct by her:

> This ban infringes on activities the Plaintiff maintains are "critically important" and "essential" to the political beliefs she and her organization actively espouse...[These] allegations of an indefinite ban from public property imposed in retaliation for the exercise of her First Amendment rights constitutes a constitutional injury cognizable under 42 U.S.C. § 1983.

id., 945-947.

B. Argument

Just as in McAfee, here soon after and as a direct result of filing of lawsuits First Amendment rights were violated. Because SEPTA, under pressure of the filing of this suit and Frantz v. SEPTA, changed its policy and coerced the Hare Krishnas to modify their consent decree, Appellant had a lesser chance of prevailing in claim under the First Amendment. Before the closing took effect, Appellants were banned from doing precisely what the Hare Krishnas could do. Such a retaliation is an unconstitutional, thinly-veiled attempt to avoid liability for obvious discrimination on the basis of content under the guise of closing a forum. SEPTA may not without justification such as the bombings in the World Trade Center case or real safety risks close the fora to leafleting and retaliate for filing suit by banning a speaker from an area to which others had access to leaflet.

2. CONTENT-BASED DISCRIMINATION

A. Law

The state may regulate expressive content only if such a restriction is necessary and narrowly drawn to serve a compelling state interest. Capitol Square Review v. Pinette, 515 U.S. 760, 761 (1995). Permitting the erection of a menorah while denying erection of a cross in a 10-acre state-owned plaza violates the First Amendment. id., 515 U.S. 761-765, 135 L. Ed 2nd 2444, 2445, 2446-2450. A ban on one person sleeping in unenclosed plaza while another is permitted is unconstitutional. U.S. v. Gilbert, 920 F. 2d 870, 885 (11th Cir. 1991). Viewpoint discrimination is impermissible in a non-public forum. An opinion cannot be the basis for for exclusion. Rosenberger v. Rector, 515 U.S. 819 (1995). A restriction of expressive speech on the basis of its content may not be characterized as a mere time, place and manner restriction. Saxe v. State College Area S.D. 240 F. 3rd 200 (3rd Cir. 2001). Content-based restrictions are subject to the most exacting scrutiny. Perry Ed. Ass. v. Perry Local Ed. Ass., 460 U.S. 37 (1983); Christ's Bride Ministries, Inc, v. SEPTA, 148 F. 3d 242 (3rd Cir. 1998)

B. Argument

Commercial solicitation, leafleting, and sale of goods and written material by ISCKON was permitted for 24 years by Consent Judgment in the same areas and in the same time period when Appellants' leafleting a religious message was banned by SEPTA practice and its new rules. It is undisputed the Hare Krishnas and no other group could leaflet in those areas during the time period when Appellants were told by SEPTA police they could not do so. No justification for this viewpoint discrimination was offered by SEPTA. Such discrimination violates the First Amendment. The Third Circuit's decision directly contradicts Capital Square Review,

supra, Rosenberger, supra, Christ's Bride Ministries, supra, Saxe, supra, Gilbert, supra, and Perry, supra,

3. NARROW TAILORING

A. Law

1. Fora[1]

2. SEPTA's Opened Paid Areas & Platforms to Expression of Ideas

A designated public forum is created by evidence of intent so to create, revealed in policies and practices in using space, the nature of the space and its compatibility with expressive activity. Christ's Bride, supra, quoting Gregoire v. Centennial School District, 907 F. 2d 1366, 1371 (3rd Cir. 1990) and Brody v. Spang, 957 F. 2d 1108, 1117 (3rd Cir. 1992). Thus, in Christ's Bride , supra, that paid advertisements were permitted in SEPTA stations as well as the nature of the forum suggests the government has dedicated the space to the expression of paid advertisements. id., at 250-251, citing Gregoire, supra, at 1374.

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[1] A. Traditional Public Forum

Public streets, sidewalks, parks, courthouse steps, airport corridors and similar areas are traditional public fora open to expression of ideas. ISKCON v. Lee, 505 U.S. 672, 693 (1992) (Kennedy, concurring).[1]

A. A Designated Public Forum Exists in the Paid Areas and Platforms

A designated public forum is property that the state has opened for expressive activity by the public or a class of speakers, Arkansas Ed. T.C. v. Forbes, 523 U.S. 666, 118 S. Ct. 1633, 140 L. Ed 2d 875, 886 - 887 (1998), citing ISKCON v. Lee, supra, at 678, by opening a nontraditional forum for public discourse. Cornelius v. NAACP, 473 U.S. 788, 800-802 (1985).

3. Rail Stations Have Less Restrictive Access Than Air Terminals

Train and bus terminals are appropriate fora for leafleting. Muskowitz v. Cullman, 432 F. Supp. 1263, 1266-67 (D.N.J. 1977); Jews for Jesus v. MTBA, 984 F. 2d 1319 (1st Cir. 1993); Creative Non Violence v. Turner, 893 F. 2d 1387 (D.C. Cir. 1990); Wolin v,. Port of N.Y., 392 F. 2d 90 (2nd Cir. 1969). In Lee, supra, the U.S. Supreme Court distinguished the restrictive access in air terminals from other "transportation nodes" such as rail and bus stations. Id., 505 U.S. at 681. Christ's Bride, id., at 250.

C. Current Activities Within Fora

In Jews for Jesus, Inc. v. M.T.B.A., 783 F. Supp. 1500 (D. Mass. 1991), aff'd 984 F. 2d 1319 (1st Cir. 1993), finding a ban on **leafleting within paid areas and on train platforms** within a major urban transit system violates the First Amendment, the First Circuit reasoned:

> Non-transit activity in the stations weakens the justification for the leafleting ban. Passengers eat food and bring in paper. Vendors sell newspapers, magazines and food within the station. Businesses leave promotional flyers unattended, musicians perform, sell tapes, and solicit contributions. The condoned presence of these activities indicates the subway system can accommodate peaceful leafleting.

id., 984 F. 2d at 1325.

D. Changed Conditions as a Prerequisite to Closing of a Forum

In Local 32B - 32J v. N.Y. Port Authority, 944 F. Supp. 208 (S.D.N.Y. 1996), significant increases in criminal activity in the

World Trade Center concourse area in New York, based on incidents like the World Trade Center bombing and statistical evidence, justified closing certain areas to the public despite previous rules permitting greater access. id., at 217.

E. Ban on Leafleting in Paid Areas and on Platforms[2]

F. Closing a Designated Public Forum

To determine whether the government may close a designated public forum, the history of expressive activity there must be considered. In Cornelius, the court looked at Perry, in which the policy did not grant general access to the school mail system and where the practice was to require the principal's permission before access to the system was granted, and at Lehman v. City of Shaker Heights, 418 U.S. 298, 299-300 (1974), where the city had limited access to advertising space on buses for 26 years. id, 473 U.S. at 803 - 804. In Lee, supra, the Supreme Court looked at the 30- year history in U.S. v. Kokinda, 497 U.S. 720 (1990) which revealed that solicitation interfered with the Postal Services's postal mission. In U.S. v. Gilbert, 920 F. 2d 878, 885 (11th Cir. 1991), where there were isolated incidents of undiscovered violations of GSA policy, the court considered whether there was evidence the government intentionally permitted others to use a portico for demonstrations. The Third Circuit provided an analytical

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[2] A ban on handbilling suppresses a great quantity of speech that does not cause the evils that it seeks to eliminate. Ward v. Rock Against Racism, 491 U.S. 781, 791 - 801 (1989); Martin v. City of Struthers, 319 U.S. 141, 147 - 149 (1943). SEPTA bears a heavy burden in justifying a total ban on leafleting, which has long enjoyed First Amendment protection. Lovell v. City of Griffin, 303 U.S. 444, 450 - 452 (1938). The religious nature of Appellant's leafleting increase the government's burden. Leafleting in "occupies the same high estate under the First Amendment as do worship in churches and preaching from pulpits." Murdock v. Pa., 319 U.S. 105, 108 - 109 (1943). Jews for Jesus, supra, 984 F. 2d at 1324. A total ban on leaflletting at a public airport violates the First Amendment, ISKCON v. Lee, 505 U.S. 672, 685 (1992).

framework in Christ's Bride Ministries:

> ... short of viewpoint discrimination, SEPTA can make any content-based restrictions it chooses. .SEPTA permitted abortion-related ads...The property at issue here...has been dedicated to expressive activity of exactly the sort in which petitioners seek to engage...Because we find SEPTA has created a designated public forum, content-based restrictions on speech that come within the forum must pass strict scrutiny...

id., 148 F. 3d 251 - 255

SEPTA bases its "right" to close paid areas and platforms to noncommercial leafleting on Perry: "a state is not required to indefinitely retain the open character of the facility [but] as long as it does so it is bound by the same standards as apply in a traditional public forum." id., 460 U.S. at 46. A closing or restriction must "be reasonable and not an effort to suppress expression merely because public officials oppose the speakers view." id. The right to close designated public fora is limited according to Justice Kennedy, who stated "the power to limit or redefine forums...does not allow the government to exclude...certain...speakers for any reason at all." Denver Area Consortium v. FCC, 518 U.S. 727, 116 S. Ct. 2374, 2414 (1996).

J. Nationwide Standard

No court anywhere has permitted a total ban on leafleting in paid areas and on platforms. In Jews for Jesus, supra, a ban on all leafleting in paid areas and on platforms in the Boston transit system was found to be unconstitutional, since safety concerns were unsubstantiated and other activities went on within the area. id., at 1324-25. In Young v. N.Y.C. Transit

Authority, 903 F. 2d 146 (2nd Cir. 1990), leafletting was permitted in these areas within New York subway, except on cars, 25 - 50' from token booths, areas closed to the public, during construction or where it interferes with stairway access, though 3.5 million people use the system daily. id., at 148 - 150. In Chicago Acorn v. Metropolitan Pier, 150 F. 3d 695 (7th Cir. 1998), the court found that indoor mall areas of a publicly-owned pier jutting into Lake Michigan must permit leafleting, despite narrow walkways. id., 703 - 704.

K. Ban in Specified Areas

A complete ban on leafletting in certain areas of a public park violates the First Amendment. Gerritsen v. L.A., 994 F. 2d 570 (9th Cir. 1993). The city claimed the areas around consulate were semi-private and had functions to carry out which necessitate separation from other areas of the park:

> .Sections of public forums [are] one and the same with the larger, undisputed public forum in which they exist. [Courts] rarely have upheld complete bans...Nor is there evidence that...[leafletting] interfered with operation of these park areas.

id., at 576-577.

L. Safety

In Jews for Jesus, supra, the First Circuit ruled:

> The authority contends that its concern for passenger safety justifies the ban on leafleting...[and that] litter causes accidents...The record, moreover, does not support the authority's fears. Over a period of 18 months, the authority's accident and incident report listed more than 250 accidents, but it did

> not indicate the type or cause of any of the reported events. These numbers alone do not support generalizations that non-commercial leafleting causes accidents... MTBA employees do not know of any accidents, crimes, or other incidents in which Plaintiffs were implicated...The evidence does not demonstrate a...connection between leafleting and safely problems.

Id., 984 F. 2d at 1325. In Christ's Bride, supra, where SEPTA rented advertising space in its stations for a profit, the Third Circuit looked at the history and found this expressive use has not interfered with providing rail transportation facilities to the public. 148 F. 3d at 250. A restriction must be based on facts, not mere speculation. In Local 32B - 32J Service Employees Int., supra, rules regarding location and numbers of those permitted to engage in leafleting and other expressive activity in the World Trade Center concourse were found to violate the First Amendment because they were not narrowly tailored to protect public safety. id., 944 F.Supp at 216

M. Less Restrictive Alternatives

Whether narrow tailoring exists may hinge on the availability of less restrictive alternatives. Instead of a total ban on leafleting or solicitation at a state fair, less restrictive alternative of limitations to fixed locations was approved in Heffron v. ISKCON, 452 U.S. 640 (1981). Similarly, in Local 32B, supra, instead of a total ban on leafleting, limitations on the number of persons permitted at one time (36) and locations (7 fixed locations), presented less restrictive alternatives. id., 944 F. Supp. at 217. A time, place or manner restriction may not burden substantially more speech than is necessary to further the government's legitimate interests. The government

may not regulate expression in such a manner that a substantial portion of the burden of speech does not serve to advance its goals. Ward v. Rock Against Racism, 491 U.S. 781, 791 - 801 (1989)

3. Argument

The alleged evils justifying the closing of the paid areas and platforms are a fantasy. There were no accident or injuries in ISCKON's 27-year history of leafleting, soliciting funds, ritual dancing, and selling of flowers. No any other city in America has in place a total ban on paid areas and platforms leafletting. Appellants here seek only to leaflet, not solicit funds, dance, or sell flowers, so the safety risk they create is less than the Hare Krishnas. There is no narrow tailoring to allow speech which does not create the safety risks and ban only that which creates more of a potential risk. In other cities, such as New York and Chicago, such narrow tailoring has been accomplished within paid areas and on platforms by requiring that leafleting take place only a certain distance from tracks, in certain specified areas only, limiting free speech activities to leafleting only, or limiting hours. SEPTA could but chose not to attempt a trial period to see if evils complained of--accidents, safety risks--occurred. There is not one case nationwide in which a total ban on all leafleting within the paid areas and on platforms of train, bus, trolley or subway stations was upheld as constitutional or in which the government was permitted without substantiated justification to close such broad areas open to speech historically. No case nationwide has supported a total ban on leafleting in paid areas and on platforms in train, bus, subway and trolley stations. Jews for Jesus, supra, found such a ban is unconstitutional, since under the Ward standard, a substantial portion of the burden on speech does not advance its goals. In Young, the standard in New York - a ban on panhandling but not on leafleting in paid areas and on platforms - supports Jews

for Jesus and argues against the total ban here. In Chicago Acorn, supra, even where there were narrow walkways leafleting was permitted. Bans on the evils the state wanted eliminated - obstruction of pedestrian traffic or of token booth lines, obstruction of stairways or escalators, or entry into areas not open to the public or closed to construction - were approved in Young and Chicago Acorn, but speech that did not lead to those evils was permitted. Here, under Ward, speech is eliminated which does not lead to the evils the government seeks to minimize. Peaceful, gentle leafleting within a reasonable distance from train platforms, without blocking pedestrians or stairways or escalators, only in areas open to the public, is banned at all times and under all circumstances when it had been permitted for 24 years without incident or any significant safety risk. Under Ward, the ban is unconstitutional.

4. WAIVER OF ISSUES

A. Law

The cases cited by the court to support its argument that the issues were not preserved do not support waiver here. The issues must be raised in the District Court. Brenner v. Local 514, 927 F. 2d 283 (3rd Cir. 1991). An appeal may be dismissed because the issues were not preserved in the lower court and in the Court of Appeals where the appeal lacks concrete, particularized facts. Holmes v. Pension Plan of Bethlehem Steel Corp., 213 F. 3d 124 (3rd Cir. 2000).

B. Argument

Clearly the District Court failed to see issues which the record indicates indisputably were at issue and were not waived. Only the 14th Amendment Equal Protection claim was waived. No records indicates the Retaliatory Closing or 1st Amendment Viewpoint Discrimination claims were waived. Waiver is a drastic conclusion. Here it is clear no waiver took place.

CONCLUSION

For the above stated reasons this Writ of Certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioners

(Any footnotes trail end of each document)
UNREPORTED – NOT PRECEDENTAL

No. 99-1795

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NICHOLAS STORTI; MICHAEL PEREZ, A MINOR AND THROUGH HIS FATHER AND NATURAL GUARDIAN, GEORGE PEREZ; GEORGE PEREZ

v.

SOUTHEASTER PENNSYLVANIA TRANSPORTATION AUTHORITY (SEPTA); JOHN K. LEARY

Nicholas Storti and George Perez, as Parent and Natural Guardian of Michael Perez,
Appellants

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 99-02159)
District Judge: Honorable Thomas N. O'Neill, Jr.

Argued July 12, 2001

BEFORE: SLOVITER, ALITO, and GREENBERG, Circuit Judges

(Filed: July 27, 2001)

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(argued)
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William H. Roberts (argued)
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Attorneys for Appellees

MEMORANDUM OPINION OF THE COURT

GREENBERG, Circuit Judge.

This matter comes on before this court on the appeal of Nicholas Storti and George Perez, as parent and natural guardian of Michael Perez, from an order of the district court granting summary judgment to the appellees, Southeastern Pennsylvania Transportation Authority and John K. Leary, SEPTA's general manager, in the appellants' action challenging SEPTA's ban on leafletting in paid areas of SEPTA's facilities and on platforms at transportation stations. We exercise plenary review on this appeal. Nelson v. Upsala College, 51 F.3d 383, *385* (3d Cir. *1995)*. Judge O'Neill set forth the background of this matter in his memorandum dated September 9, 1999, and thus we need not repeat the facts of the case. The district court, after considering the parties' motions for summary judgment, wrote that they had presented a "single ultimate issue," i.e., "does the record support a finding as a matter of law that SEPTA may or may not ban leafletting on its platforms and paid areas consistent with the First Amendment?"

After a careful review of this matter we find that the ban is reasonable, nondiscriminatory and not violative of appellants' First Amendment rights. While the appellants contend that in the past SEPTA has not been absolutely diligent in regulating activities in the implicated areas, we are satisfied that this lack of diligence should not preclude it from later enforcing the ban.

We are well aware that the appellants have sought to expand the issues on this appeal beyond the "single ultimate issue" recognized by the district court. This attempt, however, does not lead us to alter our outcome because the issues they seek to raise either are not properly before us as they were not preserved in the district court or, if preserved, have not been presented adequately here or have no merit. Thus, while at oral argument appellants contended that the regulation is vague inasmuch as the areas subject to the ban are not delineated clearly, the appellants' amended complaint does not mention this point as a portion of their causes of action. See app. at 11-12. Moreover, while the appellants contend that SEPTA adopted the ban in retaliation for earlier litigation regarding restrictions on the use of its property, their briefing of this potentially far-reaching First Amendment issue, implicating principles set forth in Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 97 S.Ct. *568* (1977), relies only on McAfee v. Deale, 20 F. Supp. 943 E.D. Va. 1998), vacated, 229 F.3d 1143 (4th Cir. 2000) (table), which involved a particularized claim of discrimination rather than, as here, an across-the-board ban of general application. In the circumstances, we regard the appellants' presentation of this issue as inadequate to advance it properly.

We also point out that we have not overlooked appellants' claim that SEPTA has discriminated against them in the past, a contention that appellants predicate on an argument that SEPTA has, treated the Hare Krishnas more favorably than them and its claim that commercial leafletters

have been treated more favorably than non-commercial leafletters with respect to the touching of persons on SEPTA property on the arm. The difficulty with these arguments is that the district court clearly considered that the appellants had abandoned these contentions to the extent they had been raised as it indicated in its opinion that appellants originally challenged SEPTA's 18-inch rule and that appellants voluntarily had "conceded a second claim that the [ban on leafletting] was a violation of their rights to equal protections of the laws." Significantly, the appellants did not suggest on a motion for reconsideration that the district court misunderstood the issues presented even though the court regarded these touching and equal protection points as abandoned. In these circumstances, and considering the appellants' cursory treatment of these issues on this appeal, we do not regard them as properly being before us. See Kirschbaum v. WRGSB Assocs., 243 F.3d 145, 151 (3d Cir. 2001). Finally, in the context of what issues remain in this case we reject appellants' argument that they were entitled to additional time for discovery.

The order of September 10, 1999, will be affirmed.

TO THE CLERK:

Please file the foregoing memorandum opinion.
BY THE COURT:

Circuit Judge

CIVIL ACTION No. 99-2159

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NICHOLAS STORTI, et al.

v.

SOUTHEASTERN TRANSPORTATION AUTHORITY, et al.

September 9, 1999, Decided

September 10, 1999, Filed

DISPOSITION:
Plaintiffs' motion for summary judgment DENIED, defendant's motion for summary judgment GRANTED and judgment entered in favor of defendants and against plaintiffs.

COUNSEL:
For NICHOLAS STORTI, MICHAEL, A MINOR, BY AND THROUGH HIS FATHER AND NATURAL GUARDIAN, GEORGE PEREZ, GEORGE PEREZ, PLAINTIFFS: J. MICHAEL CONSIDINE, JR., J. MICHAEL CONSIDINE, JR., ATTORNEY AND COUNSELLOR AT LAW, WEST CHESTER, PA USA.

For SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY (SEPTA), JOHN K. LEARY, DEFENDANTS: WILLIAM H. ROBERTS, JORDANA COOPER, BLANK ROME COMISKY & McCAULEY LLP, PHILADELPHIA, PA USA.

JUDGES:
THOMAS N. O'NEILL, JR., J.

OPINION BY:
THOMAS N. O'NEILL, JR.

OPINION:

MEMORANDUM

Plaintiffs Nicholas Storti and Michael Perez[1] distribute religious literature at rail and subway stations owned by defendant Southeastern Pennsylvania Transportation Authority (SEPTA) and bring this suit to challenge SEPTA's ban on leafletting on the platforms or in paid areas of the stations.[2] Plaintiffs claim this prohibition is facially over-broad under the First Amendment, as applicable to SEPTA by virtue of the Fourteenth Amendment.[3] The parties have filed cross-motions for summary judgment which present a single ultimate issue: does the record support a finding as a matter of law that SEPTA may or may not ban leafletting on its platforms and paid areas consistent with the First Amendment?

I.

Plaintiff Perez regularly distributes religious materials on SEPTA property, including paid areas and platforms, and wishes to continue doing so in the future. Plaintiff Storti similarly alleges that he has regularly distributed religious materials on SEPTA property, including paid areas and platforms, and wishes to continue doing so in the future.[4] Plaintiffs claim the paid areas and platforms are "designated public fora" in which the government may only impose content-neutral restrictions on expression that are narrowly tailored to serve an important government interest, and that SEPTA's ban fails this test because it silences more speech than is necessary to serve any important government interest.

Plaintiffs' standing to assert this facial challenge has not been challenged, and the parties agree the case is properly decided on summary judgment. The facts relevant to this claim are almost entirely undisputed.

A.

SEPTA operates a vast network of rail, subway, and bus lines in southeastern Pennsylvania, especially in the Philadelphia area. This network originated as a variety of different, privately-operated lines. Historically, the private companies operating these lines kept the paid areas and platforms off-limits to any but patrons, and SEPTA continued this practice with occasional, sporadic exceptions. (Marcus Aff. PP 3-4). In the large stations that are focus of plaintiffs' claims, such as the East Market Street, Suburban, and 69th Street stations, there are large free areas where transit users may get information and buy rail tickets or subway tokens and where concessionaires sell food, newspapers, and so forth. Subway riders go from the free areas through token turnstiles to the subway platforms, which may be at the same level or down a flight of stairs. Commuters do not need tickets to get to the commuter train platforms, which generally are a flight of stairs (or escalator) down from the free, mezzanine areas. The platforms range from 6 to 37 feet wide, though most are in the 14 to 28 foot range. (See Pls.' Ex. 10.) Whether subway or commuter rail, the platforms and paid areas are set off from the free areas by clear physical boundaries such as turnstiles, doors, and/or stairs or escalators.

In 1975, SEPTA and the City of Philadelphia were sued by the International Society of Krishna Consciousness of Philadelphia, Inc. ("ISKCON"), and agreed to a consent decree pursuant to which ISKCON followers were allowed to perform "sankirtan" on all SEPTA property, including paid areas and platforms. The consent degree was approved by the Honorable Alfred Luongo and has been in force ever since.

(Pls.' Ex. 1, ISKCON v. O'Neill, et al., Civ. No. 75-242, Consent Judgment filed April 25, 1975.) Plaintiff's evidence demonstrates that ISKCON's activities were essentially limited to the subway platforms at the 15th and Market Street/City Hall stations. (See, e.g., Pls.' Ex. 4 (July 14, 1991 letter from William H. Deadwyler, III, to Raymond J. Porreca, Jr.); Ex. 14 (Phillips Dep. at 37-38); Ex. 18 (Harold Dep. at 13).) Plaintiffs have also presented evidence that SEPTA allowed people to hawk newspapers in some stations, including some paid areas (see Pls.' Ex. 12), and allowed certain charity groups to hold events at stations, although there is no evidence as to whether such events were held in the unpaid areas or in the platforms/paid areas. (Pls.' Ex. 13.)

In 1989, SEPTA was sued by Raymond Frantz and a number of others who, like plaintiffs here, pursue a ministry of distributing religious literature to persons at public places. The case was settled pursuant to a Stipulation of Dismissal which allowed the plaintiffs to leaflet at SEPTA stations but expressly forbade, among other things, leafletting in paid areas and on platforms. (Pls.' Ex. 2, JOPPA, et al. v. Clayton, et al. ("Frantz I"), No. 89-4688, Stipulation of Dismissal filed June 28, 1989.) In 1997, the same plaintiffs filed suit again challenging, among other things, the restriction on leafletting in paid areas and on platforms contained in their own 1989 agreement with SEPTA. *Frantz, et al. v. Northeast Commuter Services Corp., et al ("Frantz II"), 1998 U.S. Dist. LEXIS 22764,* No. 97-6631. This Court subsequently ruled the 1989 agreement was no longer enforceable. See *1998 WL 967561* (E.D. Pa. Nov. 17, 1998).

SEPTA had been using the terms of the 1989 Frantz I Stipulation of Dismissal as its generally-applicable rules for the expressive activities of everyone but ISKCON followers. After the agreement was declared no longer enforceable, on January 27, 1999, SEPTA issued generally-applicable, written rules governing expressive activities on its property -- the "Rules Related to Constitutionally Protected Activities"

("Rules"). Among other things, the Rules ban any activities other than those that are "travel-related" in paid areas and on platforms, including the distribution of literature. SEPTA also immediately sought ISKCON's agreement to the Rules so as to end the two-tiered system it had followed since the 1975 consent decree.[5] ISKCON agreed to modification of the 1975 consent decree so that the Krishnas too would be subject to the ban on soliciting, leafleting, and similar activities in paid areas and on platforms, and this Court approved the modification on June 23, 1999. Soon thereafter, the parties settled the Frantz II litigation after grueling negotiations led by United States Magistrate Judge Sandra Moore Wells; the settlement maintained SEPTA's prohibition on leafletting in the paid areas and platforms.

B.

SEPTA's Rules establish a framework based on four broad prohibitions against (1) actions which unreasonably obstruct or interfere with transit service or pedestrian traffic; (2) panhandling; (3) non-expressive commercial activities; and (4) expressive activities (other than talking) in the paid areas and on platforms. Commercial activities that are considered expressive, including newspaper sales, solicitation, and commercial handbilling, require permits and are allowed only in specified locations in "designated areas" of SEPTA property, defined to exclude paid areas and platforms as well as transit vehicles and "restricted areas" not open to the public. (See Def. Ex. G, at p. 4, PP 1-2 (defining "designated areas" to exclude "controlled areas" and defining "controlled areas" to include paid areas and platforms); Rules 3 (establishing default rule banning any commercial activity on SEPTA property, including advertising); 4 (addressing solicitation); and 5 (addressing "Sale of Newspapers and Other Written Materials).

Non-commercial handbilling or other distribution of literature, on the other hand, is generally allowed except in

the paid areas and platforms. The Rule challenged by plaintiffs provides:

> 6. Handbilling/Distribution of Written Materials. Distribution of noncommercial leaflets, handbills, circulars or other written materials shall be permitted upon SEPTA property, except as follows:
>
> a. No person shall distribute or attempt to distribute such material on any platform or in any paid area or in any restricted area.

Other provisions, which are not challenged here, prohibit distribution of literature on buses, trains, and other transit vehicles; on stairs, escalators, elevators, ramps, and similar places; and in any manner that unreasonably obstructs or disrupts pedestrian traffic. The Rules do not place any restrictions on oral speech other than prohibiting voice amplification and "excessive noise."

In a lengthy preamble to its Rules, SEPTA states that it has attempted to provide for expressive activities on its property to the extent "consistent with SEPTA's primary function to provide a fast, reliable and economical transportation system . . . and to provide service that is accessible, affordable, safe, reliable, clean, and customer-focused." (Defs.' Ex. G, at 3, P a.) It also sets forth the specific concerns and purposes behind them. Among those relevant here are SEPTA's interests in protecting patrons' physical security; providing a "pleasant and comfortable environment"; protecting patrons from "annoyance or invasion of their rights and in minimizing any perceived risk to patrons' personal security in any and all areas of its stations and vehicles where patrons represent a captive audience and are unable to avoid unwanted communication or contact with strangers without forfeiting their fare"; maintaining an

environment in which patrons are not unduly distracted from their primary purposes in being on SEPTA property -- quickly obtaining information and locating and getting on or off transit vehicles; accommodating patrons with disabilities; preventing "undue apprehension" of the risk of criminal assault in areas where such fears tend to be greatest, including on confined platforms and paid areas; maintaining orderly and rapid flow of pedestrian traffic; and minimizing the cost of law enforcement. (Id. at 1-2.) These concerns arise against a background in which SEPTA has continued to suffer significant losses of ridership over the last decade and is trying to "rebuild its ridership base and avoid future financial catastrophe." (See Defs.' Ex. A, SEPTA's "Five Year Plan for Strategic Change" (January 1998) (reporting that SEPTA's ridership had decreased by 21% between 1988 and 1996 and that SEPTA faced major operating losses).)[6]

Plaintiffs counter that a total ban on leafletting in paid areas and platforms is not justifiable because leafletting can be done without bothering people or posing a hazard and SEPTA cannot establish a single instance in which someone was hurt as a result of leafletting. Thus, plaintiffs produce evidence that, viewed in their favor,[7] establishes that Raymond Frantz (plaintiff in the Frantz litigation, as already explained) has leafletted thousands of times over the last ten years without any complaints ever being registered by transit riders, without causing problems for pedestrian traffic flow, and without scaring riders or otherwise upsetting them. Plaintiffs' evidence also establishes that SEPTA is unaware of a single instance in which the activities of Frantz or of ISKCON followers have caused an accident or otherwise endangered anyone's safety. (See generally Pls.' Exs. 14-28.)

II.

In the parties' minds, resolution of this case turns on whether the paid areas and platforms of SEPTA's stations constitute "public fora" or "non-public fora" under the

Supreme Court's First Amendment "forum analysis." See *Perry Education Ass'n. v. Perry Local Educators' Ass'n., 460 U.S. 37, 74 L. Ed. 2d 794, 103 S. Ct. 948 (1983).* There is no dispute that plaintiffs' leafletting is within the core expressive activities protected by the First Amendment, see *ISKCON v. Lee, 505 U.S. 672, 702-03, 112 S. Ct. 2701, 120 L. Ed. 2d 541 (1992)* (Kennedy, J., concurring), and the parties appear to agree that forum analysis must govern the Court's consideration of this case. Plaintiffs challenge SEPTA's Rule against leafletting in paid areas and on platforms based entirely on their view that these areas are "designated" public forums; they offer essentially no argument that the Rule is not a reasonable, viewpoint-neutral restriction if the paid areas and platforms are considered non-public fora.[8]

A.

Under forum analysis doctrine, the extent to which government may regulate expression depends on the nature of the government property at issue. See generally *Perry, 460 U.S. at 45-46; Cornelius v. NAACP Legal Defense & Education Fund, 473 U.S. 788, 799-800, 87 L. Ed. 2d 567, 105 S. Ct. 3439 (1985).* One category is traditional public fora, such as sidewalks, streets, and parks, which have traditionally been used for political and other expression. See *Perry, 460 U.S. at 45.* The government may impose content-based regulations on expression in traditional public fora only upon a showing that such regulation is required to serve a compelling governmental interest and is narrowly tailored to achieve that purpose. Id. The government may impose content-neutral time, place, or manner restrictions so long as they are narrowly tailored to serve a significant government interest and leave open ample alternative channels for expression. Id.; *Ward v. Rock Against Racism 491 U.S. 781, 791, 105 L. Ed. 2d 661, 109 S. Ct. 2746 (1989).*

"Designated public fora," on the other hand, are places which are not traditional public fora but have been opened to

the public as places for expression. *Perry, 460 U.S. at 46.* "The Constitution forbids a state to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place." *Id. at 45.* Public forums may be created for and lawfully limited to use for certain purposes and/or by certain groups. *Id. at 45-46, n. 7,* citing *Widmar v. Vincent, 454 U.S. 263, 70 L. Ed. 2d 440, 102 S. Ct. 269 (1981)* (university meeting facilities); *City of Madison Joint School District v. Wisconsin Public Employment Relations Comm'n, 429 U.S. 167, 50 L. Ed. 2d 376, 97 S. Ct. 421 (1967)* (school board meetings); *Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 43 L. Ed. 2d 448, 95 S. Ct. 1239 (1975)* (municipal theater). The government creates such forums by intentionally opening them to discourse; inaction or allowing some instances of expression does not amount to public designation. *Cornelius, 473 U.S. at 802.* And just as the government may create public forums by intentional designation, so may it close them. See id. ("the government 'is not required to indefinitely retain the open character of the facility'"), quoting *Perry, 460 U.S. at 46;* see also *Perry, 460 U.S. at 62, n. 5* (Brennan, J., dissenting) (agreeing with the majority that the government may close a non-public forum altogether "to preserve the property under its control for the use to which it is lawfully dedicated"). Designated public fora are subject to the same standards as traditional public fora. *Perry, 460 U.S. at 46.*

Government properties that are neither traditional nor designated public fora -- "non-public fora" -- may be subjected to greater restriction on expression. "In addition to time, place, and manner regulations, the state may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry, 460 U.S. at 46* (holding that internal mail system of public school was a non-public forum), citing *United States Postal Service v. Greenburgh*

Civic Ass'n, 453 U.S. 114, 131, n. 7, 69 L. Ed. 2d 517, 101 S. Ct. 2676 (1939). Thus, the government may impose any restrictions on expression in non-public fora or close them altogether so long as the restrictions are reasonable and viewpoint-neutral.

B.

The Supreme Court has not applied forum analysis to a subway or rail system.[9] The closest analogy is provided by its consideration of airports in *International Society of Krishna Consciousness, Inc. ("ISKCON") v. Lee, 505 U.S. 672, 693, 120 L. Ed. 2d 541, 112 S. Ct. 2701 (1992).* At issue in ISKCON v. Lee were regulations of the Port Authority of New York and New Jersey which prohibited solicitation and distribution of literature in the terminal buildings of the three major New York City area airports. The Court held that the ban on solicitation was constitutional and that the ban on leafletting was not. As to the leafletting ban, four justices found the airport terminals were non-public fora in which the Port Authority could reasonably prohibit leafletting because of the "risks of congestion" and other problems it posed. See *505 U.S. 830 at 832* (Rehnquist, J., dissenting). Four justices found that the terminals were public fora and that the ban on leafletting could not withstand the strict scrutiny given restrictions on expression in such fora. See *505 U.S. 672 at 693-703* (Kennedy, concurring in the judgment). The tie was broken by Justice O'Connor, who believed that the airport terminals were non-public fora but that the ban on leafletting could not meet even the reasonableness standard for restrictions on speech in nonpublic fora in light of the "multipurpose," shopping mall-like environment in the terminals, which included restaurants, coffee shops, book stores, clothing stores, post offices, food stores, barber shops, and newsstands. See *id. at 688-92.* The Port Authority, according to Justice O'Connor, had failed to offer even an explanation of why leafletting was inconsistent with the

multitude of uses to which the terminals were put. *Id. at 691-92.*

Thus, five of the nine justices in ISKCON v. Lee concluded that even shopping mall-like terminals in airports were non-public fora because they were neither "traditional" public fora (sidewalks, streets, and parks), nor forums intentionally designated for expression such as leafletting. *505 U.S. 672 at 686* (O'Connor, J.)("The Port Authority has not expressly opened its airports to the types of expression at issue here . . . and therefore has not created a "limited" or "designated" public forum relevant to this case.").

The other four justices, led by Justice Kennedy, strongly criticized the majority's forum analysis as a "jurisprudence of categories" that defines public fora in terms of either ancient traditions or government fiat and thus "leaves almost no scope for the development of new public forums absent the rare approval of the government." *505 U.S. at 695* (Kennedy, concurring in the judgment). In the view of these four, "open, public spaces and thoroughfares that are suitable for discourse may be public forums, whatever their historical pedigree and without concern for a precise classification of the property." *Id. at 697;* see also *id. at 698-99* (setting forth factors to be considered in analyzing whether property should be considered a public forum, including the physical characteristics of the property, the similarity between that property and traditional public fora, the public access and uses which have been permitted, the compatibility of expressive uses with other intended uses, and the availability of time, place, or manner regulations to ensure compatibility).

Justice Kennedy has not been alone nor even the first in criticizing the Court's forum analysis. See e.g., *ISKCON v. New Jersey Sports and Exposition Authority, 691 F.2d 155 (3d Cir. 1982)* (Adams, J.) (dissenting from denial of petition for rehearing). Nonetheless, ISKCON v. Lee has never been

overruled, and this court remains bound by the determination in that case that the public, shopping mall-like terminals of an airport are not public fora. Accord, e.g., *Chicago Acorn v. Metropolitan Pier and Exposition, 150 F.3d 695 (7th Cir. 1998)* (closely following Justice O'Connor's analysis in ISKCON v. Lee in considering First Amendment claims with respect to various areas of Chicago's huge, publicly-owned and operated Navy Pier); *Hawkins v. City and County of Denver, 170 F.3d 1281 (10th Cir. 1999)* (same with regard to plaintiffs' claimed right to picket and leaflet in covered walkway-lobby area in performing arts complex). The present case, however, is one in which I believe there would be something close to unanimity on the Supreme Court despite its divisions over forum analysis.

III.

Plaintiffs appear to make two basic arguments in support of their contention that SEPTA cannot ban leafletting in the paid areas and on platforms. One is that the paid areas and platforms are designated public fora and that SEPTA's exclusion of plaintiffs' noncommercial leafletting from these areas is invalid because it is arbitrary and content-based. The second is that the ban flunks the "reasonableness" test of Justice O'Connor's ISKCON v. Lee opinion both because it is content-based and because plaintiffs can leaflet without posing any danger or other threat to SEPTA's patrons.

I note that neither party has specifically addressed what the proper unit for forum analysis is in this case, but with some exceptions, especially on plaintiffs' part, both generally appear to assume that it is the paid areas and/or platforms themselves. This is reasonable, although I think it might also be reasonable to consider the entirety of each station as the proper forum on the assumption that the point of expressive activities on SEPTA's property is to reach as many people as possible.[10] Cf. *Cornelius, 473 U.S. at 801* ("In defining the forum we have focused on the access sought by the

speaker."). As set forth below, the choice ultimately makes no difference to my disposition of this case.

A.

Plaintiffs' first argument is that SEPTA's ban on leafletting in the paid areas and platforms constitutes impermissible content-based regulation of expression in a designated public forum. This argument is based on a fundamental misreading of SEPTA's Rules. Plaintiffs believe the Rules allow commercial leafletting and newspaper sales in the paid areas and platforms yet ban non-commercial leafletting in the same area. (See Pls.' Brief at 3.) As should already be clear, this is incorrect. The Rules ban any sort of commercial activity and any sort of expression involving written material -- including newspaper sales, solicitation, and leafletting -- in the paid areas or on platforms. Each of these activities are only allowed in "designated areas," which by definition exclude paid areas and platforms. See Def. Ex. G, at p. 4 (preamble to SEPTA's Rules), PP 1-2; Rules 3-6. Newspaper sales, commercial handbilling, and solicitations are further restricted to "specified locations" within the designated areas and may require permits. See id., Rules 4 and 5. Thus, SEPTA had provided equal or more space and easier access for non-commercial leafletting than for distribution of commercial materials or newspapers, but has decided that these and similar activities -- commercial and noncommercial alike -- are to be confined to the free, non-platform areas of its stations.

Insofar as plaintiffs argue that SEPTA has historically allowed a variety of activities on its platforms and paid areas which demonstrate its intent to designate these areas as at least limited public fora and preclude it from now closing them, I must reject that argument as well. Whether the government has designated a particular place as a public forum is, according to the Supreme Court, a matter of the government's intent and purpose. SEPTA has presented

undisputed evidence that it has only ever intentionally allowed solicitation and leafletting in the paid areas and platforms by the Krishnas pursuant to the 1975 consent decree, and newspaper sales and a few similar activities on certain occasions in certain stations. Otherwise, as in its 1989 agreement with the Frantz plaintiffs, SEPTA has attempted to preclude such activities from those areas. More fundamentally, the government does not create a public forum by inaction or accident and, once it has created one, may close it. If SEPTA ever designated the paid areas or platforms of its stations as public fora (which the record does not support), it has now clearly and effectively revoked that designation.

B.

The remaining question is whether SEPTA may ban all distribution of written materials in the paid areas and platforms. Assuming the paid areas and platforms themselves are the proper fora for analysis, it is clear they are non-public fora. Plaintiffs have never contended they are traditional public fora, and as set forth above they are not designated public fora. Moreover, the record establishes that the paid areas and platforms have not traditionally been used for expression and are not now. The uncontroverted evidence is that, with the exception of Krishna followers pursuant to the 1975 consent degree and newspaper hawkers in a few areas, SEPTA's long-time practice, like that of the private carriers preceding it, has been to exclude handbilling, solicitation, and similar activity from these areas.

Because the platforms and paid areas are non-public fora, SEPTA may regulate and even entirely ban expression in them so long as the regulations are viewpoint-neutral and reasonable. There can be no doubt SEPTA's Rule fulfills both requirements. Obviously it is viewpoint-neutral, as any type of distribution of written material is prohibited. It is also reasonable. SEPTA has articulated and offered evidence to

support specific and important reasons for its view that the platforms and paid areas should be dedicated exclusively to transit use. These include SEPTA's interests in ensuring passenger safety and maintaining unhindered pedestrian traffic flow on the narrow and confined platforms, as well as its more general commercial interests in ensuring the perceived security and comfort of its customers and thus keeping and attracting new transit riders.

Plaintiffs rely heavily on *Jews for Jesus, Inc. v. Massachusetts Bay Transportation Authority, 984 F.2d 1319 (1st Cir. 1993),* in which the court invalidated a total ban on leafletting in the paid areas of Boston's subway system. That case, however, only underscores the reasonableness of SEPTA's Rules, and also demonstrates why I would reach the same conclusion if I viewed each entire SEPTA station as being the proper forum for analysis and the ban on leafletting in paid areas and platforms as a time, manner, and place restriction on expression within that forum. In Jews for Jesus, according to the court, the record revealed a "myriad of [] nontransit activity in the stations":

> Passengers bring in paper and food items for immediate consumption. Vendors, including wandering newspaper hawkers, sell newspapers, magazines, food, and drink within the stations. Businesses leave promotional flyers unattended. Musicians set up portable stations to perform, sell tapes, and solicit contributions. The [transit authority] deliberately has invited into the subway system a range of expressive activities that can produce problems similar to those it attributes to leafletting. The condoned presence of these activities indicates that the subway system can accommodate peaceful leafletting. See

Jews for Jesus, 984 F.2d at 1325 (footnote omitted). As the court alluded, the stations in Boston were much like the airport terminals in ISKCON v. Lee, and, just as there, the ban on leafletting was not reasonable in light of the stations' "multipurpose environments" -- environments which themselves belied the contention that leafletting was incompatible with the intended purposes of the stations.

The physical layout and environment of SEPTA's stations vary in important ways from the situation in Boston faced by the Jews for Jesus court, and SEPTA, laudably recognizing that fact, has not attempted to paint a ban with such a broad and blunt brush. As with solicitation, commercial handbilling, newspaper sales, and other commercial activities, SEPTA allows noncommercial leafletting in the large, multipurpose free areas of its stations; on the physically separate platforms and paid areas, on the other hand, no activities other than those that are transit-related -- waiting for, departing, and boarding vehicles -- are allowed. The situation is thus not as if plaintiffs have been banned from leafletting in an airport terminal, replete with its bookstores and newsstands and coffee shops and bars. Under SEPTA's Rules, leafletting may continue in SEPTA's analogs to the airport terminals -- the free, non-platform, thoroughfares and mall-like areas of its stations. Rather, plaintiffs are barred from leafletting in SEPTA's analogs -- the paid areas and platforms -- to the secured airport passenger ways, waiting areas, and jetways in which no commercial or similar activity is allowed. Cf. *505 U.S. at 700* (Kennedy, J., concurring) ("The airport areas involved here are open to the public without restriction. . . . Plaintiffs do not seek access to the secured areas of the airports, nor do I suggest that these areas would be public forums.").

I would reach the same result viewing each SEPTA station, rather than the paid areas and platforms, as the proper forum. The stations likely should be considered non-public fora. While it is conceivable that some parts of some SEPTA stations have, as a matter of historical fact, been used for political expression or assembly or some other sort of expression so as to fit the Supreme Court's test for traditional public fora, plaintiffs have not contended that SEPTA's stations are traditional public fora and there is no evidence in the present record that would tend to support that possibility. Accordingly, ISKCON v. Lee compels the conclusion that the stations are not public fora because, like airport terminals, they have not "by long tradition" been used for expressive purposes and "don't count among their purposes the 'free exchange of ideas.'" *ISKCON v. Lee, 505 U.S. at 686* (O'Connor, concurring), citing *Cornelius, 473 U.S. at 800; Perry, 460 U.S. at 45;* see also *United States v. Kokinda, 497 U.S. 720, 726-730, 111 L. Ed. 2d 571, 110 S. Ct. 3115 (1990)* (plurality opinion) (holding sidewalks around United States Postal Service building were a non-public forum). If the stations are nonpublic then it is quite obvious from what has already been said that SEPTA's reasonable, viewpoint neutral restrictions on expression in the paid areas and platforms pass muster under the First Amendment.

Even if SEPTA's stations were considered modern public fora pursuant to Justice Kennedy's more malleable forum analysis, in my view SEPTA's restriction meets the criteria for a proper time, place, and manner restriction consistent with the First Amendment. See *Kokinda, 497 U.S. at 738* (Kennedy, J., concurring) (arguing that it was unnecessary to decide whether Postal sidewalks were public or non-public fora because the restriction at issue met traditional standards applied to time, place, and manner restrictions on speech in public fora). Time, place, and manner regulations are valid so long as they are content-neutral, narrowly tailored to serve a significant government interest, and leave open ample

alternative channels for expression. *Ward v. Rock Against Racism 491 U.S. 781, 791, 105 L. Ed. 2d 661, 109 S. Ct. 2746 (1989).* Here, the leafletting ban is obviously content-neutral, and SEPTA has demonstrated that the restriction serves significant interests related to its primary purpose of providing comfortable, efficient, and safe commercial transit service. SEPTA has also narrowly tailored the restriction to serve these interests. It does not purport to ban leafletting from areas in which similarly distracting or intrusive activities, such as newspaper or concession sales or commercial handbilling, are allowed, and its ban applies only where its riders are actually boarding, departing, or awaiting their rides, in areas that are confined and exposed to moving transit vehicles. And finally, SEPTA's Rule leaves ample room for alternative channels of expression. Plaintiffs may reach precisely the same people who end up in the paid areas and platforms, and in a more efficient manner, when those persons enter the stations or are moving through the free areas, and plaintiffs do not contend to the contrary.

CONCLUSION

In sum, plaintiffs' challenge to SEPTA's ban on leafletting in the paid areas and platforms of its stations rests largely on their mistaken belief that SEPTA intends to allow commercial handbilling and other commercial activities in these areas while excluding plaintiffs' noncommercial leafletting. To the contrary, SEPTA seeks to exclude any distribution of literature and any similar activity in these areas and to reserve them exclusively for their primary, transit-related functions, while allowing plaintiffs ample alternative areas for leafletting in other areas of its stations. Whether viewed as a restriction on expressive activity in the nonpublic fora of the paid areas and platforms or as a time, place, and manner restriction on expression within the larger area of each entire station, in my view SEPTA's prohibition is valid under the First Amendment.

ORDER

AND NOW this 9 day of September, 1999, upon consideration of the parties' cross-motions for summary judgment and the various filings related thereto, it is hereby ORDERED that plaintiffs' motion is DENIED, defendant's motion is GRANTED, and judgment is entered in favor of defendants and against plaintiffs.

THOMAS N. O'NEILL, JR. J.

Footnotes

[1] George Perez, the father of Michael Perez (a minor who sues by and through his father), was also named as a plaintiff in this case despite being a plaintiff in the previously-filed Frantz litigation (discussed further below). In the Frantz litigation, plaintiffs also sought, among other things, access to the platforms and paid areas, but recently settled without gaining access to those areas. In light of his involvement in that case, I proceed on the assumption that George Perez is a plaintiff in this case only in his representative capacity.

[2] Plaintiffs also originally challenged a rule requiring that persons distributing literature keep themselves and their material at least 18 inches away from the bodies of others, but that rule has since been abandoned by SEPTA in settlement of the Frantz litigation.

[3] Plaintiffs have voluntarily conceded a second claim that the restriction was a violation of their rights to equal protection of the laws. (See Pls.' Proposed Order, Doc. No. 11.)

[4] In addition to plaintiffs' general allegations that they are being prevented from leafletting on platforms and in paid areas by the fact of SEPTA's prohibition, Michael Perez alleges a specific incident on April 29, 1999 in which he and his father were stopped by SEPTA police officers and

ordered to cease leafletting on the lower train platform at SEPTA's Market Street East Station at 11th and Market Streets.

[5] SEPTA had been discussing these sorts of issues with ISKCON for years. In 1991, SEPTA's legal office and ISKCON officials corresponded and met with regard to activities in the paid areas/platforms, resulting in ISKCON's agreement that its followers would not perform sankirtan in paid areas where they would be less than 12 feet from the edge of the platform. (See Pl. Ex. 4.)

[6] SEPTA emphasizes three interrelated concerns in particular: rapid and orderly traffic flow on and off transit vehicles; the physical safety of patrons while on narrow platforms proximate to moving vehicles; and patrons' sense of their personal security. Especially when platforms and paid areas are crowded, SEPTA believes they should be free from distractions and obstacles to traffic flow, including those posed by leafletters. (See e.g., Marcus Aff. PP 6-9.) Of equal if not pre-eminent concern to SEPTA is its patrons' perceptions of their own security in these confined areas. As Captain Steven D. Harold of SEPTA's police force and SEPTA's experts have explained, personal security is one of the major concerns of SEPTA's users and an area in which perceptions of SEPTA is weak. (See Harold Aff. P 6.) In the paid areas and platforms, patrons are confined; they cannot leave without giving up their fare; and concerns for personal safety, especially at times of low use, is most heightened. (Harold Aff. PP 14-15.)

[7] SEPTA disputes several of the following characterizations.

[8] Plaintiffs are not entirely resigned to forum analysis and rely heavily on a First Circuit case, *Jews for Jesus, Inc. v. Massachusetts Bay Transportation Authority, 984 F.2d 1319 (1st Cir. 1993)*, in which the court invalidated a ban on leafletting in the paid areas of Boston's subway system. Both

parties interpret Jews for Jesus as departing from traditional forum analysis -- for which it receives plaintiffs' praise and defendant's criticism. Even granting the parties' characterization of Jews for Jesus, defendants are correct in contending (and plaintiffs tacitly concede) that forum analysis has been reaffirmed by both the Supreme Court and the Third Circuit in recent cases. See *Arkansas Education Television Comm'n v. Forbes, 523 U.S. 666, 118 S. Ct. 1633, 140 L. Ed. 2d 875 (1998); Christ's Bride Ministries, Inc. v. SEPTA, 148 F.3d 242, 247 (3rd Cir. 1998).* Indeed, in Christ's Bride Ministries the Third Circuit applied the doctrine to a First Amendment claim involving SEPTA advertising property.

Moreover, I do not agree that the First Circuit abandoned or repudiated forum analysis in the Jews for Jesus case. In my view, the court concluded that it was not important what kind of forum was at issue because, pursuant to ISKCON v. Lee (discussed further below), the restrictions at issue did not pass the "reasonableness" standards that would apply regardless of whether they were considered "time, place, and manner" restrictions imposed on speech in a public forum or content-neutral restrictions on speech in a non-public forum. See *Jews for Jesus, 984 F.2d at 1323-1324.* In my view, the court's approach in Jews for Jesus was consistent with Lee.

[9] In *Lehman v. City of Shaker Heights, 418 U.S. 298, 41 L. Ed. 2d 770, 94 S. Ct. 2714 (1974),* the Court did consider the forum of advertising card space on a city bus.

[10] In fact, there is no evidence that plaintiffs have any particular interest in the paid areas and platforms or believe them to be the best places to reach the most people in a particular station. Plaintiffs do not argue that SEPTA's rules keep them from effectively spreading their message, and such little evidence as there is in the record, as well as the general layout of SEPTA's stations, suggest that the free/non-platform areas are the most effective places for leafletting.

(See Pls.' Ex. 28, Frantz Dep. at 40-41.) Plaintiffs appear to be motivated simply by their conviction that, as a matter of principle, they should have the right to leaflet where ever they like on SEPTA's public property.

No. 99-1795

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NICHOLAS STORTI; MICHAEL PEREZ, A MINOR AND THROUGH HIS FATHER AND NATURAL GUARDIAN, GEORGE PEREZ; GEORGE PEREZ

v.

SOUTHEASTER PENNSYLVANIA TRANSPORTATION AUTHORITY (SEPTA); JOHN K. LEARY

Nicholas Storti and George Perez, as Parent and Natural Guardian of Michael Perez,
Appellants

SUR PETITION FOR REHEARING

Present: BECKER, Chief Judge, SLOVITER, MANSMANN, SCIRICA, NYGAARD, ALITO, ROTH, McKEE, BARRY, AMBRO, FUENTES, and GREENBERG,* Circuit Judges

The petition for rehearing filed by

Appellants, Nicholas Storti and George Perez, as Parent and Natural Guardian of Michael Perez,

in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, not having voted for rehearing by

the court en banc, the petition for rehearing is denied.
By the Court,

Dated: September 10, 2001
Circuit Judge

Footnotes

*Hon. Morton I. Greenberg, Senior Circuit Judge, as to panel rehearing only.

CIVIL ACTION No. 99-2159

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

NICHOLAS STORTI; MICHAEL PEREZ, A MINOR AND THROUGH HIS FATHER AND NATURAL GUARDIAN, GEORGE PEREZ; GEORGE PEREZ
Plaintiffs

v.

SOUTHEASTER PENNSYLVANIA TRANSPORTATION AUTHORITY (SEPTA); JOHN K. LEARY
Defendants

AMENDED COMPLAINT

1. Plaintiff is Nicholas Storti, an adult citizen and resident of Pennsylvania who resides at 420 Bush Street, Bridgeport, PA 19405.

2. Plaintiff Michael Perez is a minor who is a citizen and resident of Pennsylvania who resides at 12 Iona Avenue, Narbeth, PA 19072. He sues by and through his father and natural guardian, George Perez.

3. Plaintiff George Perez is an adult citizen and resident of Pennsylvania who resides at 12 Iona Avenue, Narbeth, PA 19072. He sues on his own behalf and on behalf of his son, Plaintiff Michael Perez, a minor.

4. Defendant Southeastern Pennsylvania Transportation Authority (SEPTA), is a Pennsylvania municipal corporation with a principal place of business located at the Sovereign Building, 714 Market Street 3rd Floor, Philadelphia, Pennsylvania 19106 which owns and operates, under the authority of the Commonwealth of

Pennsylvania, train, bus and trolley stations throughout Southeastern Pennsylvania.

5. Defendant John K. Leary, General Manager of SEPTA, is responsible for the operation of SEPTA's transit system, and has a business address located at 714 Market Street, 3rd Floor, Philadelphia, PA 19106.

JURISDICTION

6. Venue is proper in the Eastern District, as the cause of action arose, the events which gave rise to the claim took place in and all witnesses reside there.

7. Jurisdiction is proper under 42 U.S.C. § 1983 as the Defendants are state actors and the claim arises out of violations under the First and Fourteenth Amendments to the U.S. Constitution.

FACTS

8. On April 29, 1999 at about 7:50 a.m., Plaintiffs Michael and George Perez distributed religious leaflets in the unpaid area about 20-25 feet from the escalator (on the second floor, north side) bringing passengers from the lower train platform at SEPTA's Market Street Fast Station, 11th and Market Streets, Philadelphia, PA. They then descended the stairs and leafleted religious pamphlets to people on the platform below. No one complained about these activities. They were approached by uniformed SEPTA police officers Irving D. Smith, Badge No. 186, and Harper, Badge No. 307, at about 8:00 a.m., who told Plaintiffs, Michael and George Perez they were not permitted to distribute religious leaflets anywhere on the lower level platform and were ordered to immediately cease such activity and leave the platform area. Said Plaintiffs immediately obeyed the order and left the platform area.

9. On September 10, 1998, Raymond Frantz, an individual who resides at 7103 Pennarth Avenue, Upper Darby, PA 19082, attempted to distribute religious literature on a

train platform at Market Street East Station, owned and controlled by Defendant SEPTA. A SEPTA police officer named Irving D. Smith approached Plaintiff, told him it was SEPTA policy that he not be permitted to leaflet on train platforms, and ordered him to vacate the platform and cease leafleting there. Frantz complied with the order.

10. SEPTA's January 27, 1999 Rules Governing Constitutionally Protected Activities (hereinafter referred to as "Rule") and prior policy has banned during the years 1975 to present distribution of all religious literature on all platforms and paid areas in its train, bus and trolley stations in S. F. Pennsylvania to all individuals or groups except for Hare Krishnas, who since 1975, have had the right by a consent decree to do so and have regularly done so.

11. SEPTA during the years 1975 - present has permitted in-person and other sales of newspapers on platforms and paid areas in its train, bus and trolley stations in S. E. Pennsylvania.

12. Plaintiffs George Perez and Michael Perez regularly leaflet religious materials on SEPTA property, including within paid areas and platforms, and intend to do so in the future.

13. Plaintiff Storti, regularly leaflets religious materials in a variety of public locations on SEPTA property, including paid and unpaid areas, platforms and other areas and has done so as recently as April 10, 1999. He plans to do so regularly in the future in such areas. On occasion he politely and courteously approaches within 18" of the torso of an individual while leafleting.

14. Defendants fully intend to enforce the Rules in the future, and thus Plaintiffs' speech is chilled as each time they leaflet within paid areas and platforms, they are subject to prosecution for violations of the paid area and platform and 18" "approach" bans, and this discourages them from leafleting there and causes them to spend less time leafleting within paid areas and platform areas for fear of being told by SEPTA police to leave or being prosecuted for leafleting there.

15. Plaintiffs will suffer irreparable harm as a result of the enforcement of the Rules if injunctive relief is not granted.

16. There is no adequate remedy at law.

17. Plaintiffs have a strong likelihood of prevailing on the merits.

18. The harm to Plaintiffs if injunctive relief is not granted outweighs the harm to SEPTA if appropriate injunctive relief is granted.

FIRST CAUSE OF ACTION:
FIRST AMENDMENT CLAIM

19. The averments of paragraphs 1-18, above are incorporated by reference.

20. The total ban on leafleting in platform and paid areas in SEPTA's train, bus and trolley stations in S. F. Pennsylvania (Rules, § 6(a)) and the ban on approaching within 18 inches of the torso of a pedestrian or another individual while leafleting (Rules, § 6(h)) as applied to Plaintiffs, silences or infringes more speech than is necessary to protect an important government interest within a designated public forum and/or is content-based restriction, in violation of the First Amendment.

WHEREFORE, Plaintiffs demand judgment be entered in their favor and against Defendant SEPTA and

Leary in an amount in excess of $100,000 and request a declaratory judgment, injunctive relief, compensatory damages, attorneys fees and costs and whatever other relief court may deem appropriate.

SECOND CAUSE OF ACTION; FIRST AND FOURTEENTH AMENDMENT CLAIM

21. The averments of paragraphs 1 - 20 above are incorporated by reference.

22. The ban on Plaintiffs' distribution of any religious literature on platforms or within paid areas of SEPTA's train, bus and trolley stations within S. E. Pennsylvania while at the same time permitting distribution of religious literature, sale of religious items, and solicitation of donations there by the Hare Krishnas, as well as the deliberate effort to close the paid areas and platforms to all lcafteting activity by a January 27, 1999 new policy (put into effect as a direct result of and while a challenge to the constitutionality of the ban on platform and paid area leafleting was pending by Plaintiff in Civil Action No. 97-CV-663 1) is a content-based ban and a violation of Equal Protection under law as guaranteed by the First and Fourteenth Amendments.

WHEREFORE, Plaintiffs demand judgment in their favor and against Defendants SEPTA and Leary in an amount in excess of $100,000 plus declaratory judgment, injunctive relief, compensatory damages, attorney fees and costs and such other relief as the court may deem appropriate.

Date: May 3, 1999

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTER DISTRICT OF PENNSYLVANIA

CIVIL ACTION No. 75-242

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS OF PHILADELPHIA, INC. et al.

v.

JOSEPH F. O'NEILL, et al.

CONSENT JUDGMENT

WHEREAS, Plaintiffs, International Society for Krishna Consciousness of Philadelphia, Inc. (ISKCON), and thirteen (13) individually named Plaintiffs filed complaint and Motion for Preliminary Injunction herein on January 29, 1975;

WHEREAS, without the admission by any party in respect to any issue, the parties, by their respective attorneys herby consent to the making and entry of this Order on Plaintiff's Motion for Preliminary Injunction;

NOW, THEREFORE, before any testimony has een taken herein, without trial or adjudication of any issue of fact or law herein, and upon consent of the partied hereto, it is hereby

ORDERED, ADJUDGED AND DECREED as follows:

I

This Court has jurisdiction over the subject matter of this motion and of the parties hereto. The Complaint states claims upon which relief may be granted.

II

The provision of this Consent Judgment applicable to the Defendants named herein shall also apply to their successors and assigns; to their directors, officers, agents, members and employees; to all police officers of the City of Philadelphia; to all SEPTA supervisors and employees; and to all persons in active concert or participation with any of them who receive actual notice of this Order by personal service or otherwise.

III

The following findings of fact are stipulated and agreed upon for purposes of this Order:

1. The Krishna Consciousness Movement is a recognized and authentic religion.

2. The International Society for Krishna Consciousness of Philadelphia, Inc. (ISKCON) and its members are devotees of the Krishna Consciousness Movement.

3. The Krishna Consciousness Movement imposes upon its devotees a mandate to perform "Sankirtan" as a means of broadcasting the glories of God to all man.

4. "Sankirtan" involves various religious rituals including, inter alia, (a) dancing, chanting, beating cymbals and drums in public places, (b) the dissemination of the word of God through preaching and reading aloud on public ways from religious literature, (c) the distribution of religious literature, sanctified foodstuffs and flowers to the public and (d) the solicitation and acceptance of contributions.

5. Plaintiffs contend that, in performing "Sankirtan," devotees must go "wherever people gather," i.e., into the streets, byways and other public places.

6. For purposes of this Consent Judgment, the term "public places" includes, inter alia, pedestrian walking places and sidewalks, train stations and concourses, train terminals and platforms (including paid area platforms) and all airport facilities (including terminals, concourses and standing areas) where members of the public are permitted to walk, sit or otherwise congregate without presenting passenger tickets. "Public places" does not include SEPTA owned trains, trolleys, trackless trolleys, elevated trains, subways and other moving vehicles.

IV

The Defendants Joseph F. O'Neill, Harry R. Bellinger, and the City of Philadelphia are enjoined and restrained as follows"

1. from proceeding with prosecutions pending in the Common Pleas Courts of Philadelphia County (and listed on Appendix "A" hereof) which charge Plaintiffs or other members of Plaintiff society with violations of City Ordinance 9-203, airport regulation 3A, or other ordinances prohibiting panhandling, disorderly conduct or defiant trespassing, where such charge was based upon the performance of "Sankirtan," by the devotee charged;

2. from arresting, prosecuting, detaining and/or searching the person of the Plaintiffs and members of Plaintiff society because of their unconventional appearance, manner, lifestyle and or religious activities;

3. from interfering with the Plaintiffs and members of Plaintiff society in the performance of "Sankirtan" in any public places.

V

Defendant James C. McConnon; and all other agents and employees of SEPTA, are enjoined and restrained from

detaining, searching or otherwise interfering with the Plaintiffs and members of Plaintiff society while they are performing "Sankirtan" in any public places with the exception of SEPTA owned trains, trolleys, trackless trolleys, elevated trains, subways or other moving vehicles.

VI

1. Plaintiffs and members of Plaintiff society, while performing "Sankirtan" in public places, shall not act in an unreasonable or disorderly fashion.

2. The performance of "Sankirtan," as described in paragraph III, subsections 4 and 5, of itself, shall not be considered unreasonable or disorderly conduct.

3. Plaintiffs and members of Plaintiff society agree to refrain from chanting and beating cymbals on the block on which the City Hall is located since such conduct may interfere with the orderly functioning of the court rooms therein.

VII

all manner of actions, course of actions, suits, judgments, damages, and claims which relate to the claims assorted in this lawsuit and which arose or occurred prior to the date of this release.

IX

Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or implementation of this Judgment, for the modification of any of the provisions hereof, for the enforcement of compliance therewith, and for the punishment of violations thereof.

SO ORDERED:

Alfred A. Luongo
United States District Judge

Dated: April 25, 1975

Supreme Court, U.S.
FILED
JAN 10 2002
OFFICE OF THE CLERK

(2)

No. 01-865

IN THE

Supreme Court of the United States

NICHOLAS STORTI AND MICHAEL PEREZ,
A MINOR, BY and THROUGH HIS FATHER and
NATURAL GUARDIAN, GEORGE PEREZ,

Petitioners,

v.

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION
AUTHORITY and JOHN K. LEARY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Was the court of appeals correct to affirm the district court's grant of summary judgment where it applied well-established First Amendment principles in upholding as reasonable and content-neutral a transit authority's rule pursuant to which the transit authority permits distribution of noncommercial handbills but regulates the location where this activity may occur by confining it to areas other than the platform areas abutting its train tracks and moving transit vehicles and to areas outside the confined "paid" areas of its stations?

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COUNTER-STATEMENT OF THE CASE

A. Introduction.

Petitioners provide a highly selective and somewhat disorganized account of the proceedings below. A more accurate summary may be found in the district court's opinion at 6a to 12a.

This case involves an unsuccessful First Amendment challenge to a transit station rule adopted by the Southeastern Pennsylvania Transportation Authority ("SEPTA"), which permits access to SEPTA's transit stations for purposes of non-transit-related expressive activities such as leafletting, but regulates where in the stations such activities may occur by prohibiting such activities on subway, regional rail and bus platforms and in paid areas. In the absence of any genuine issue of material fact, the Honorable Thomas P. O'Neill, Jr. of the United States District Court for the Eastern District of Pennsylvania correctly granted summary judgment in favor of SEPTA as a matter of law, holding that SEPTA's written Rules Relating to Constitutionally Protected Activities ("the Rules") restricting leafletting to the larger transit station areas outside (1) "paid" areas and (2) station platforms comports with all applicable First Amendment principles.[1] The Court of Appeals for the Third Circuit (Sloviter, Alito, and Greenberg, Circuit Judges), in an unreported memorandum decision after oral argument, affirmed the decision of the district court holding the SEPTA policy at issue to be "reasonable, nondiscriminatory and not violative of appellants' First Amendment rights." 3a.

As the courts below recognized, this case involves only the application of well-settled First Amendment aspects of the "public forum" doctrine to a particular factual record. Petitioners point to

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1 "Paid areas" are defined in the Rules as "areas of SEPTA property that passengers access after utilizing a fare instrument."

"Platform" is defined in the Rules as "an area of SEPTA property from which passengers board or exit SEPTA transit vehicles and includes sidewalks adjacent to transit bus berths and boarding islands at SEPTA stations and railway and bus platforms immediately adjacent to moving transit vehicles, stub ends of platforms, trackbeds, driveways, or aprons."

no actual conflict among the circuits. Petitioners' main contentions are that the district court and court of appeals misapplied the law to the facts and that both the district court and the court of appeals misunderstood or overlooked certain aspects of their First Amendment challenge. Petitioners are incorrect and in any event present no question that warrants further review by this Court.

B. The Proceedings Below.

1. The District Court Proceedings.

In the district court, petitioners challenged Rule 6(a) of SEPTA's written Rules.[2] Rule 6(a) states:

> No person shall distribute or attempt to distribute such material on any platform or in any paid area or in any restricted area. 10a.

The Rules limit leafletting activities, which are otherwise permitted so long as the leaflets are noncommercial and the activity comports with certain restrictions concerning the safe flow of pedestrian traffic, to the expansive areas outside the "paid" and platform areas of SEPTA stations ("the paid and platform area restriction"). After conceding their Fourteenth Amendment challenge, petitioners contended in the district court that the paid and platform area restriction violated their First Amendment right to freedom of speech.

Based on the largely uncontradicted record presented, which included unrebutted affidavits concerning public safety from a SEPTA police captain and an engineering expert supporting the paid and platform area restriction, the district court rejected this contention. In a Memorandum and Order dated September 10, 1999, the district court held that SEPTA was entitled to summary judgment and denied petitioners' cross-motion for summary judgment.

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2 Petitioners' account of the proceedings below is misleading because the facts recited, some of which do not appear of record at all and most of which were developed in a separate litigation that involved a challenge to SEPTA's policies in effect before implementation of the Rules, primarily relate to the time period *before* January, 1999, when the Rules were implemented.

The district court correctly analyzed the summary judgment motions under this Court's "public forum" decisions.[3] The district court correctly determined that the paid and platform areas at issue were "non-public" fora, *i.e.*, that these areas of the stations had not been intentionally opened up to discourse by SEPTA, and that accordingly SEPTA was free to "impose any restrictions on expression . . . or close them altogether so long as the restrictions are reasonable and viewpoint-neutral." 14a. After a careful review of this Court's First Amendment "public forum" decisions, the district court remarked that despite certain differences among the members of this Court with respect to "public forum" analysis, on the facts of this case, "there would be something close to unanimity on the Supreme Court[.]" 16a.

The district court carefully considered and applied this Court's decision in *International Society of Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992) (involving a ban on solicitation and leafletting in airport terminals) and noted that the Court had held that the equivalent of SEPTA's "free areas" — namely, the "multipurpose" areas of the airport terminals that included restaurants, coffee shops, book stores, clothing stores, post offices, food stores, barber shops, and newsstands — had not been intentionally opened to expression and therefore were "non-public" fora. The district court noted that the facts of the present case presented a much easier decision than *Lee*. The areas at issue in this case — limited to the platforms and paid areas adjacent to moving transit vehicles — are the areas that are analogous to an airport's "secured airport passenger ways, waiting areas, and jetways" that under *Lee* clearly would be classified as a "non-public" forum. 20a.

With respect to pre-1999 use of the platform areas by a Hare Krishna group pursuant to a 1975 consent decree in an earlier litigation initiated by that group, the district court held that this prior use, which was discontinued upon modification of the 1975 consent decree in 1999 and simultaneous promulgation in 1999 of

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3 The district court also held that the outcome of this case would be the same even without reference to the public forum analysis because the paid and platform area restriction was a reasonable and content-neutral time, place and manner restriction.

SEPTA's written Rules (which in the 1999 Modified Decree the Krishna organization expressly agreed to comply with) did not alter the analysis. Noting that well-established precedent of this Court confirmed that "[w]hether the government has designated a particular place as a public forum" is a "matter of the government's intent and purpose," 17a, and summarizing the record as showing the evidence "undisputed" that SEPTA had "only ever intentionally allowed solicitation and leafletting in the paid areas and platforms by the Krishnas pursuant to the 1975 consent decree, and newspaper sales and a few similar activities on certain occasions in certain stations," the district court held no public forum had been created. 18a.

Alternatively, the district court held that even if the relevant forum were once opened - which it held was not the case on the factual record before it - SEPTA had properly exercised its right to reclaim its property by enacting the written Rules and securing the agreement of the Krishna organization to modify and modifying the 1975 Krishna consent decree to comport with those uniform Rules prohibiting these non-transit-related activities in the paid and platform areas. As this Court's precedents establish, *Cornelius v. NAACP Legal Defense And Educ. Fund*, 473 U.S. 788, 802 - 803 (1985), *Perry Education Ass'n. v. Perry Local Educators' Ass'n.*, 460 U.S. 37, 46 (1983), and as the district court correctly stated, "the government does not create a public forum by inaction or accident and, once it has created one, may close it." 18a. Applying these well-settled principles to uncontradicted facts, the district court concluded: "If SEPTA ever designated the paid areas or platforms of its stations as public fora (which the record does not support), it has now clearly and effectively revoked that designation." 18a.

The district court next concluded that the paid and platform area restriction was both reasonable and viewpoint-neutral and thus permissible in a non-public forum: "There can be no doubt SEPTA's Rule fulfills both requirements." 18a. "Obviously it is viewpoint-neutral, as any type of distribution of written material is prohibited." 18a. "It is also reasonable." 18a. "SEPTA has articulated and offered evidence to support specific and important

reasons for its view that the platforms and paid areas should be dedicated exclusively to transit use. These include SEPTA's interests in ensuring passenger safety and maintaining unhindered pedestrian traffic flow on the narrow and confined platforms, as well as its more general commercial interests in ensuring the perceived security and comfort of its customers and thus keeping and attracting new transit riders." 18a.

Finally, and in an alternative holding, the district court determined that (i) even if the entirety of the stations were considered to be the relevant forum for First Amendment analysis, and (ii) even if the forum were "public" rather than non-public, the paid and platform area restriction would easily survive First Amendment scrutiny under the "time, place and manner" test articulated by this Court in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). For this additional, alternative reason, the district court found that SEPTA's narrow limitation on the place where leafletting might occur does not violate the First Amendment.

2. The Decision Of The Court Of Appeals.

After hearing oral argument on July 12, 2001, by Memorandum Opinion dated July 27, 2001, the court of appeals affirmed, concurring in the district court's conclusions. The court of appeals stated: "After careful review of this matter we find that the ban is reasonable, nondiscriminatory and not violative of appellants' First Amendment rights." 3a. The court of appeals also expressly considered the additional arguments presented on appeal and determined that petitioners' belatedly and inadequately raised additional arguments concerning alleged vagueness, "retaliation," and other issues were not properly before the court of appeals, were not preserved in the district court or, if preserved, had not been presented adequately in the court of appeals or had no merit. 3a.

SUMMARY OF ARGUMENT

Petitioners present no issue worthy of review on a writ of certiorari by this Court. They do not expressly contend there is a conflict among the circuits on any point of law relevant to disposition of this case, and there is none. The circuit court cases

cited by petitioners are wholly consistent with the decision of the courts below. The primary authority relied upon by petitioners, *Jews for Jesus, Inc. v. Massachusetts Bay Transportation Authority*, 984 F.2d 1319 (1st Cir. 1993), was easily distinguished by the district court.

Nor is the decision of the courts below inconsistent with any decision of this Court. On the contrary, the courts below carefully and correctly applied this Court's public forum precedents to the facts of this case.

This case involves a routine and correct application of well-established First Amendment public forum principles to a particular factual record. Any difficult or complicated points of law that were raised at all by petitioners in the courts below were raised belatedly or inadequately or were waived.

ARGUMENT

PETITIONERS PRESENT NO ISSUES THAT ARE WORTHY OF CONSIDERATION UPON A WRIT OF CERTIORARI

A. Petitioners Do Not Contend That There Is A Conflict Among The Circuits.

Petitioners do not expressly contend that there is a conflict among the circuits on any point of law involved in this case. Nor could they. This case involves only the application of well-established First Amendment "public forum" precedents of this Court to the unique facts of this case.

Petitioners do cite the decision of the United States Court of Appeals for the First Circuit in *Jews for Jesus, Inc. v. Massachusetts Bay Transportation Authority*, 984 F.2d 1319 (1st Cir. 1993), but the Third Circuit's decision below is not in conflict with the First Circuit's decision in that case. *Jews for Jesus* involved application of the public forum doctrine to a very different factual record. In that case, the transit authority permitted and condoned a wide variety of expressive activities throughout its stations — musical entertainment, wandering newspaper hawkers, distribution of promotional flyers — yet simultaneously sought to prohibit

leafletting. The district court in the present case adequately answered this alleged "conflict" when it easily distinguished *Jews for Jesus* and praised SEPTA for "not attempt[ing] to paint a ban with such a broad and blunt brush." 20a.

Nor does the Third Circuit's decision below conflict with the holding of *Chicago Acorn v. Metropolitan Pier and Exposition Authority*, 150 F.3d 695 (7th Cir. 1998), which petitioners cite. There, the Seventh Circuit determined, on a very different factual record that did not even involve transit stations, that the government had not designated the walkways of its property (a renovated navy pier containing recreational and commercial facilities) as public fora for free expression. With respect to proposed leafletting in the indoor mall area walkways, pathways that were "pedestrian walkways leading mainly to shops," 150 F.3d at 703, the Seventh Circuit held that under this Court's decision in *Lee* and consistent with the First Circuit's decision in *Jews for Jesus*, such walkways were areas where leafletting must be permitted. This conclusion is entirely consistent with the decision in this case: SEPTA permits leafletting in the *"multipurpose" public areas* of its stations and only restricts the activity *in the separate "paid" and platform areas of its stations.*

Finally, the decision below involves no conflict with *Young v. New York City Transit Authority*, 903 F.2d 146 (2d Cir. 1990), involving an anti-panhandling restriction. In fact, the Second Circuit in *Young* found that the entirety of the New York City subway system was a *non*-public forum, at least with respect to the category of speech at issue in that case, begging and panhandling, and the Second Circuit upheld the transit authority's ban on begging and panhandling. 903 F.2d at 161-62. Petitioners do not even appear to contend that *Young* conflicts with the decision below. They could not. Petitioners merely point to the regulations of the New York City Transit Authority in *Young* to show that one transit authority may have adopted less restrictive rules with respect to leafletting.[4]

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4 Petitioners make the contention in both their "Questions Presented" and their "Statement of the Case" that no other comparable major transit system has a total platform and paid area ban on leafletting, but this contention is not supported by

Even if true, that consideration supplies no reason why the Court should review the decision below.

This case presents no question on which there is a circuit conflict on the applicable First Amendment public forum principles.

B. The Decision Below Is Not Inconsistent With Any Decision Of This Court.

Petitioners incorrectly suggest that the decision below is inconsistent with decisions of this Court. Thus, they argue that SEPTA engaged in impermissible content or viewpoint discrimination and that the decisions of the courts below contradict this Court's decisions in *Capitol Square Review v. Pinette*, 515 U.S. 760 (1995), *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995), and *Perry Education Ass'n. v. Perry Local Educators' Ass'n.*, 460 U.S. 37 (1983). There is no merit to petitioners' contention. There is no conflict upon any relevant point of law. Rather, petitioners merely disagree with the lower court's unanimous application of the well-settled principle that government may not discriminate based on point of view to the particular facts of this case. The courts below correctly determined that SEPTA's Rules permitted no leafletting *by any person or group*, that SEPTA's Rules were consistent and *did not* except the Hare Krishnas in light of the 1999 adoption of the Rules and the accompanying modification of the prior 1975 Krishna consent decree, and therefore that this Court's viewpoint precedents were not offended in any respect.

With respect to the district court's holding that the transit areas at issue constitute non-public fora, the decision below likewise does not depart from this Court's public forum precedents. This Court's decisions in *Perry* and *Cornelius*, as well as *Lee*, were strictly and carefully applied by the district court in this case, which found that the paid and platform areas had not been "intentionally opened up to discourse by the government" – that they "have not traditionally been used for expression and are not now." 18a. Even putting aside

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record evidence in the case and the statement is improperly included in the petition for a writ of certiorari.

the historic use of the property, the district court applied this Court's precedents in *Perry* and *Cornelius* that government is "not required to indefinitely retain the open character of the facility," 460 U.S. at 46, 473 U.S. at 788, and determined that even if SEPTA had ever designated the paid areas or platforms as public fora – something the "record does not support" 18a – "it has now clearly and effectively revoked that designation." 18a.

Finally, even if each of these sound determinations is ignored, the district court alternatively held, applying this Court's precedent in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), that if the paid and platform area restriction were viewed alternatively under the "time, place and manner" test applicable to a public forum, it is proper. 21a – 22a. The paid and platform area restriction is content-neutral, narrowly tailored to serve a significant government interest, and leafletters have ample alternative means for communication throughout the other expansive halls, concourses, corridors and walkways of SEPTA's transit stations. 21a – 22a. The *Ward* time, place and manner test was correctly applied and this alternative holding is also perfectly consistent with the decisions of this Court.

C. This Case Involves A Routine Application Of Well-Established First Amendment Public Forum Principles To A Largely Uncontested Factual Record.

Neither the district court nor the unanimous panel of the court of appeals identified any unsettled law pertinent to disposition of the issues presented in this case. To the extent any complicated legal issues were presented at all to the court of appeals, they involved the doctrine of First Amendment "retaliation," a theory that, if pleaded at all (the term "retaliation" did not appear in petitioners' amended complaint, despite petitioners' unmeritorious contention (Pet. at 6.) that paragraph 22 of their amended complaint (33a) raised it), was inadequately raised before, and not considered by, the district court. Petitioners' briefing of that issue in the court of appeals was so cursory and inadequate that the court of appeals appropriately declined to consider it in the first instance, on both grounds. Moreover, petitioners' entire treatment of "retaliation" in the court of appeals relied upon a single — vacated — district court

decision, *McAfee v. Deale*, 20 F. Supp. 2d 943 (E.D.Va. 1998), *vacated*, 299 F.3d. 1143 (4th Cir. 2000) (table). As the court of appeals noted, the *McAfee* decision involved a particularized claim of retaliatory discrimination, whereas the "retaliation" claim here involves a contention of claimed retaliation against a class of persons. That is, petitioners appeared to contend that the filing of an earlier and different lawsuit by a *different* individual (not even one of the petitioners in this case) — a lawsuit that was settled with those parties' claims released — caused SEPTA to close the relevant forum to all persons (not just the prior plaintiffs and petitioners) and that this closing of property to all somehow may be deemed to constitute constitutionally impermissible "retaliation." These novel and potentially broad-reaching contentions were never amplified and were inadequately presented to the courts below for consideration, but instead were smuggled into the case in the court of appeals when it became clear that the appeal was clearly unmeritorious based on the issues petitioners had actually litigated in the district court. The court of appeals correctly rejected these belated contentions as waived and/or without merit.

Finally, as to petitioners' claim that the courts below wrongly found a "waiver" of certain arguments, petitioners do not contend there is a circuit conflict or other legal uncertainty about the proper standards for a finding of "waiver" of an issue. Rather, again petitioners only contend that there was a misapplication of the well-settled principles of waiver to the particular facts of this case. No overarching issue meriting plenary review by this Court is presented. Moreover, the unanimous court of appeals panel was clearly correct in determining that these issues had been waived.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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